

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LINDA PASSINEAU,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

OPINION AND ORDER

11-cv-842-bbc

Plaintiff Linda Passineau is seeking judicial review of defendant Michael J. Astrue's denial of her application for Supplemental Security Income benefits. Plaintiff contends that the administrative law judge erred in finding that she was physically capable of performing substantial gainful work in light of her mental deficiencies, her physical and psychological problems and her diminished work pace. After reviewing the record, I conclude that the administrative law judge reached the right result. Plaintiff has a low IQ and some psychological problems, but, as the administrative law judge found, she is capable of performing light, unskilled work that does not involve contact with the public and is limited to small group work that is object-oriented and taught to plaintiff by demonstration.

Therefore, I will affirm the denial of benefits.

The following facts are drawn from the administrative record (AR).

FACTS

A. Background

Plaintiff was born on May 20, 1959. She finished high school and had one year of college. Her past work includes jobs as a potato grader at a produce company, an aide at an assisted living facility and assembler and packer of gifts at a catalog company. Her last substantial gainful employment ended before January 1, 2007, although she worked at the potato grading job from August 17, 2007 until April 30, 2010, on a full-time seasonal basis. She stopped working there when she lost her ride to work.

Plaintiff applied for disability benefits on June 27, 2008, alleging that her disability had begun on January 27, 2007. Her application was denied initially and again after she moved for reconsideration. After she filed a written request for a hearing, the agency scheduled one before administrative Law Judge Kevin McCormick on August 3, 2010 in Wausau, Wisconsin. Plaintiff was represented at the hearing by her counsel, Jared Redfield. Leslie Goldsmith testified as an impartial vocational expert.

In a decision issued on October 1, 2010, the administrative law judge found plaintiff not disabled. AR 130. On November 4, 2011, the Appeals Council wrote plaintiff to tell

her that it had denied her petition to review the administrative law judge's decision. AR 1.

B. Medical Evidence from Treating Physicians

1. Raj V. Singh, M.D.

Dr. Raj Singh has been plaintiff's treating physician at least since January 31, 2006. On June 13, 2006, he recorded her past medical history as including benign essential hypertension, bronchial asthma, sarcoidosis, gastroesophageal reflux disease, degenerative joint disease, bilateral carpal tunnel syndrome release surgery and right shoulder rotator cuff tear, status post repair. (She had had a thoractomy of her lungs in 1995.) He noted that plaintiff was a nonsmoker and that she denied any alcohol intake. She had no history of lower back pain and no joint pain in her shoulders, hips or knees. AR 586-87. She had no tenderness over her cervical, thoracic or lumbosacral spine. Dr. Singh found her mental status "Alert, fully oriented, normal mood, full affect" and her speech of "[n]ormal fluency and articulation." AR 588. Her degenerative joint disease was stable and her sarcoidosis was stable. AR 589.

On April 13, 2009, plaintiff appeared at Dr. Singh's office in a wheelchair, complaining of sharp pain, localized to the left side of her back. AR 880. Dr. Singh found no tenderness in plaintiff's upper spine and only moderate tenderness in the left lumbar paraspinal area, with normal flexion and extension of both hips and knees. AR 850. He

prescribed naproxen and flexeril along with Vicodin on an as-needed basis.

At an appointment on April 22, 2009, Singh found plaintiff's back pain improved with the anti-inflammatory medications. AR 853. He advised physical therapy for two to three weeks.

Sometime thereafter, plaintiff received a diagnosis of diabetes. At her annual physical on June 26, 2009, Dr. Singh counseled her about diabetes and gave her some prescriptions. AR 866.

Plaintiff saw Dr. Singh on May 11, 2011, for painful joint symptoms. AR 931. His examination showed no tenderness in any of her joints and no obvious swelling or deformities. Flexion and extension movement of both knees were normal. AR 932. Subsequent lab reports showed no evidence of any inflammatory arthropathy. AR 928.

2. Quinquan Fu, M.D.

Plaintiff saw Dr. Quinquan Fu on September 22, 2008, for what she thought was rheumatoid arthritis. AR 769. She told him she had swelling and stiffness in her hands in the mornings that lasted for 15-20 minutes, that she could not lift 50-pound boxes and that she was constantly in pain. Id. She said she had pain in her legs as well, particularly in the left leg, and pain in her back. Id. Dr. Fu found that plaintiff had good range of motion in her fingers and normal hand grip without sensory deficit. His assessment was that plaintiff

had chronic hand pain, probably not as severe as she described, that her neck pain was of short duration and that she had “questionable radiculopathy” on her left lower back, as well as leg pain. AR 771.

3. Owen B. Keenan, M.D.

On January 14, 2009, plaintiff saw Dr. Owen Keenan, an orthopedist, for the first time, complaining of left shoulder pain. AR 786. She reported that her only previous surgery had been for rotator cuff repair on her right side. AR 787. Her spinal x-rays showed good alignment and no significant disc disease. AR 788. An MRI showed no muscle tear in her shoulder. AR 790.

C. Evidence from Treating Mental Health Professionals

1. John Waters, M.D.

Dr. Waters undertook an initial psychiatric diagnostic evaluation of plaintiff on May 23, 2007 at the Marshfield Clinic. His preliminary Axis I diagnosis was adjustment disorder, not otherwise specified. AR 600. Plaintiff denied having any psychiatric problems. She told Dr. Waters that she was feeling “a little down,” but that she felt that way only about once or twice a month. AR 616. Her boyfriend accompanied her and told Waters that plaintiff tended to lie to him. He asked whether Waters would support a disability claim for plaintiff

because he thought she needed to be on disability. Id.

Dr. Waters found plaintiff to have below average intellectual functioning, but he found her quality of speech normal in volume and pace, her thought process coherent, her recent and remote memory apparently intact and her insight and judgment adequate. AR 618. He thought that she might be malingering to obtain disability benefits. Id.

At a February 6, 2008 visit, Dr. Waters recommended that plaintiff take Citalopram to alleviate her anxiety. AR 676. He saw her again on March 6 and increased her dosage. On December 10, 2008, she told him that she had some trouble falling asleep but that her mood had been stable and she had no problems with concentration, energy level, appetite or anxiety. AR 808.

2. Virendra Varia, M.D.

Dr. Virendra Varia, also of the Marshfield Clinic, saw plaintiff on June 10, 2008. Plaintiff told Varia that Citalopram had helped decrease her general anxiety and that her mood was "great." AR 727. She denied any significant problems or concerns with concentration, energy, sleep or appetite. She was to continue with the medication and return in six months for further monitoring of the medication. Id.

3. Anthony J. Louis, MSW

Anthony Louis saw plaintiff at the Marshfield Clinic for the first time on June 5, 2007 and concluded that she had an unspecified adjustment disorder as well as borderline intellectual functioning or perhaps mild mental retardation. AR 620. He noted that her mood was stable, that she had full affect, clear and coherent speech and that her thought process was logical. Id. She told him she had previously worked 17 hours a day at a cheese factory but was presently working 32 hours a week, although she did not like the job and wanted to quit. She had applied for several positions in the food industry. Id. He made similar notations on July 17, 2007, when he saw her again. AR 622. He found her statements about her boyfriend inconsistent, at times saying that he treated her very well and then saying that the relationship was less than satisfactory. Id. Plaintiff told Louis that she had lost her job because she had complained about working excessive hours; he found her statement of questionable validity. She told him she was filing for disability. Id.

The record contains one additional report from Lewis, of a treatment session on August 27, 2007, at which plaintiff described her continuing conflict with her boyfriend. AR 624. She said that she had started working part-time and said that she enjoyed going to work because it gave her something to focus on and made her feel better about herself. Id.

4. Susan Shane, MSW

Shane saw plaintiff approximately once a month, from December 2007, until at least September 2011. At the December 2007 meeting, plaintiff reported that she had been a lot more agitated; Shane diagnosed an anxiety disorder. AR 709. In a February 20, 2008 meeting, plaintiff's then boyfriend talked about plaintiff's needing to be on disability. AR 715. Plaintiff told Shane she was on new medication that had affected her mood in a positive way, although it did not help her to focus and concentrate. Shane found her improved. Id.

Shane was still seeing plaintiff in September 2011, when Shane completed a form for the Social Security Administration. AR 1012-15. She identified plaintiff as having decreased energy, blunt, flat or inappropriate affect, feelings of guilt or worthlessness, generalized persistent anxiety, mood disturbance, difficulty thinking or concentrating, pathological dependence, passivity or aggressiveness, emotional withdrawal or isolation, memory impairment and sleep disturbance. AR 1011. She rated plaintiff unable to meet competitive standards for unskilled work in remembering work-like procedures, understanding and remembering very short and simple instructions, carrying out very short and simple instructions, making simple work-related decisions, completing a normal workday and workweek without interruptions from psychologically based symptoms, performing at a consistent pace without an unreasonable number and length of rest periods, responding appropriately to changes in a routine work setting and dealing with normal work stress. AR 1012. In other areas, she rated plaintiff as either unlimited or limited but satisfactory. Id.

In rating plaintiff's ability to do semiskilled and unskilled work, she rated plaintiff unable to understand and remember detailed instructions, to carry out detailed instructions, to set realistic goals or make plans independently of others and to deal with stress of semiskilled and skilled work because of her low borderline intellectual functioning. AR 1013. She found plaintiff limited but satisfactory in interacting appropriately with the general public, maintaining socially appropriate behavior, adhering to basic standards of neatness and cleanliness and using public transportation. She rated plaintiff seriously limited but not precluded in traveling in unfamiliar places. Id. She noted that plaintiff had low intellectual functioning and that her anxiety made her functioning worse.

Shane found that plaintiff had mild limitations in activities of daily living and in maintaining social functioning but that she had marked difficulties in maintaining concentration, persistence and pace and that she had had one or two episodes of decompensation in a 12 month period, each of at least two weeks duration. AR 1014. She added that plaintiff had a current history of one or more years of inability to function outside a highly supportive living arrangement with an indication of continued need for such an arrangement. Id. She thought plaintiff's impairments would cause her to be absent from work three times a month. Id.

Shane's reports show that plaintiff reported feeling better over the course of her sessions with Shane. E.g., AR 711 (Jan. 22, 2008: "She is doing a little bit better"); 715

(Feb. 20, 2008: “She has improved from when she was here last time.”); 720 (March 19, 2008: “She is doing much better than she had before.”) 727 (June 10, 2008: “Plaintiff’s emotional state has improved.”)

D. Reports of Consulting Physicians

1. Richard Hurlbut, Ph.D.

Plaintiff met with Dr. Richard Hurlbut on September 11, 2008, for a mental status evaluation and administration of an intelligence test. AR 730. He found that her full scale IQ was 74, placing her within the borderline range. Her verbal and performance scores of 74 and 78 fell within the same range. Id.

During her mental status evaluation, plaintiff said that her chief complaint was a learning disability, along with difficulty concentrating. AR 731. She said she had been able to graduate from high school with the aid of special education and that she had studied basic skills at the Chippewa Valley Technical College. She told Hurlbut that she had fibromyalgia, chronic fatigue syndrome, constant neck pain and high blood pressure. She reported lung problems, cataract surgery and glaucoma in her right eye. She said she had a diagnosis of depression for which she was seeing Michael Field and a therapist, Susan Shane, both at the Marshfield Clinic, and that her depression had improved since she had been on medication. AR 732. She reported poor sleep, extreme headaches and a great deal of anxiety. Id.

Dr. Hurlbut concluded that plaintiff would have difficulty understanding even simple instructions but that she would be able to carry out simple tasks and remember them if she was shown several times how to do them. AR 733. She would generally respond adequately to supervisors and co-workers, but would have a great deal of anxiety around people and would have trouble working close to them. She would possibly be able to perform tasks that she could do by herself; she would have limited concentration and attention and a slow work pace; and she would have difficulty withstanding even routine work stress and adapting to change. Id.

2. Stuart Waltonen, Ph.D

Plaintiff saw Dr. Stuart Waltonen on April 17, 2008, for a neuropsychological evaluation. AR 685. She told him that she was trying to get on disability because she could no longer work and her mind drifts, but she had been turned down twice and was now appealing. She told Waltonen that she could work until noon, but had difficulty staying focused in the afternoon and that her boss had threatened to fire her because of her lack of concentration. AR 685. She said she had worked at Figi's (a mail order company) for about 26 years and at the Ho Chunk Casino for about 18 months as a dishwasher on a full-time basis and found it an easy job. Id.

Waltonen found plaintiff alert and oriented. AR 686. Her concentration and

attention were within normal limits, with no evidence of distractibility; her speech was clear and fluent; her language was unimpaired and her memory seemed intact. Id. He found her mood “rather variable and a little dramatic” and her thoughts “somewhat illogical, at least with regard to her current social situation.” Id. Her WAIS - III scores were 80 and 84. AR 687. Waltonen assessed plaintiff as being of low average intelligence, id., and he found that she had learning disorders in reading, math and reading comprehension. AR 688.

E. Evidence from Agency Consultants

I. Michael Mandli, Ph.D

On March 18, 2009, agency consultant Michael Mandli prepared a Mental Residual Functional Capacity Assessment of plaintiff, finding that she was not significantly limited in most respects, but moderately limited in the ability to understand and remember detailed instructions; the ability to carry out detailed instructions; and the ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods. AR 820-21. Mandli concluded that plaintiff was “quite able to carry out [activities of daily living] and appears more socially active than she reports,” and capable of meeting the basic mental demands of unskilled work. AR 822.

In a Psychiatric Review Technique, Mandli found that plaintiff had depressive

syndrome characterized by fewer than four symptoms, sleep disturbance, decreased energy and difficulty concentrating and thinking. AR 827. She also had borderline intellectual function and fewer than three symptoms of generalized persistent anxiety: motor tension and apprehensive expectation. AR 829. He concluded that she had no limitations on maintaining social functions, mild limitations of the activities of daily living and moderate limitations in maintaining concentration, persistence and pace. AR 834.

2. Dr. George Walcott, M.D.

Agency consultant George Walcott, M.D., completed a Physical Residual Functional Capacity Assessment on September 29, 2008, assessing plaintiff's back pain. He found that she could lift 20 pounds occasionally, 10 pounds frequently, and that she could stand or walk about 6 hours in an 8 hour workday and sit for about the same amount of time. AR 742. He assessed her ability to push and pull as imited. Id. He based his findings on her report that she had tenderness along the right side of her neck and could not turn her head to the right because of the pain, the anterior flexion of her lumbar spin was decreased to about 80 degrees, because of pain; and she could barely extend her lumbar spine to five degrees or more. He noted that he found plaintiff's statements about her symptoms and their functional effects to be partially credible. Id.

3. Jack Spear, Ph.D

Agency consultant Jack Spear completed a Mental Residual Functional Capacity Assessment of plaintiff on October 1, 2008. AR 749-51. He found plaintiff moderately limited in the ability to understand and remember directions, the ability to maintain attention and concentration for extended periods, the ability to accept instructions and respond appropriately to criticism from supervisors, the ability to respond appropriately to changes in the workplace and the ability to set realistic goals or make plans independently of others. AR 749-50. He noted that plaintiff had reported sadness, irritability and mood swings but that these problems had been better since she was put on medication. AR 751. He believed she would have difficulty understanding even simple instructions but could probably carry out simple tasks if shown what to do. She would have a great deal of anxiety around people but could possibly perform tasks that she could do by herself. She would have difficulty withstanding even routine work stress and would have difficulty adapting to change. Id. Spear concluded that plaintiff was capable of performing the basic mental demands of unskilled work with little contact with the public. Id.

In a Psychiatric Review Technique form, Spear said that plaintiff had affective disorders, mental retardation and anxiety-related disorders. AR 753. He identified the affective disorder as a disturbance of mood, evidenced by depressive symptoms, characterized by anhedonia, decreased energy, feelings of guilt or worthlessness and difficulty

concentrating. AR 756. He reported her intelligence as full scale 74, verbal scale 74 and performance of 78. AR 757. He also reported anxiety evidenced by motor tension, autonomic hyperactivity and apprehensive expectations. AR 758. He found that plaintiff was mildly limited in activities of daily living and maintaining social functioning and that she was moderately limited in maintaining concentration, persistence or pace. AR 763.

4. Syd Foster, D.O

Dr. Syd Foster prepared a Physical Residual Functional Capacity Assessment of plaintiff on March 16, 2009, taking into account a primary diagnosis of chronic pain and left shoulder pain, as well as sarcoidosis and asthma. AR 812. He found that plaintiff could lift or carry 50 pounds occasionally, 25 pounds frequently; she could walk or sit for about six hours in an eight-hour day; and she had no limitations on her ability to push and pull, except for the limitations on lifting and carrying. AR 813. He found no postural, manipulative, visual, communicative or environmental limitations, with one exception, which was that plaintiff was limited in reaching all directions. AR 814-16.

Foster noted that plaintiff had well controlled asthma and a history of sarcoidosis with lung nodules having been removed, and that she was a smoker. AR 819. At various times, she had complained of rheumatoid arthritis, fibromyalgia and kidney problems but no doctor had never diagnosed any of these conditions. Id. At a June 8, 2009 physical

examination, she had normal breath sounds, no spinal tenderness, normal range of motions of her extremities, normal strength, sensation, reflexes and gait. She was unable to move her head to the right because of pain but had good range of motion of her fingers and wrists. Foster did not think that plaintiff's complaint of pain on neck rotation was consistent with the examination findings. Id.

Foster noted that plaintiff was working part time, that she cooked and did all household chores plus yard work at her own home and helped her father at his house. Id. He found her reports of constant pain inconsistent with objective findings and concluded that her statements about her pain symptoms and their effect on her functioning were not credible. Id.

F. Function Reports

In a third party function report, Lynn Ann Munro a friend of plaintiff, wrote that she had known plaintiff for four months and saw her once a week at plaintiff's house. AR 436. She said that plaintiff got dressed, showered, cooked meals, did housework when she was able, washed dishes, swept, mopped and dusted. Id. & AR 437-38. She also took care of her cat, feeding it and cleaning the litter box. AR 437. She shopped for food and personal items once a month, and enjoyed baking and sewing, as well as talking with others on the telephone or in person. She went to the Neighborhood Table weekly for a community meal.

Id. In her own report, plaintiff reported enjoying reading and visiting her in-laws at least once a week and engaging in church work. AR 485.

David Tetzlaff filed a function report, describing himself as a friend of plaintiff who had known her for a year and a half. AR 502. He reported coming to plaintiff's house each weekend to do laundry, go on shopping trips and eat with her, either at her house or at a restaurant. Id. He said that plaintiff prepared meals and did other work around the house, visited friends and relatives and watched TV. Id. In addition, he said that plaintiff did housework for her father, babysat for her fiancé's nieces, took care of her pets, did yardwork, household repairs, lawn moving, and shopped once or twice a week for food. AR 503-05. Tetzlaff wrote that plaintiff visited family and friends on a regular basis, barhopped most Saturday nights and ate out occasionally. AR 506. Two to three days a week she participated in activities and talked with others. Id. He said she could follow spoken and written instructions. AR 507.

G. Hearing Testimony

1. Plaintiff's testimony

At the August 3, 2010 hearing before the administrative law judge, plaintiff testified that she was born on May 20, 1959 and had completed high school and one year of college. AR 180. She said that she had worked as a potato grader at Jubilee Produce from August

17, 2007 until April 30, 2010, earning about \$6200 in 2008 and \$6,600 in 2009. AR 180-81. She left Jubilee when her roommate retired and could no longer drive her to work. AR 181. She had also worked at Figi's on a seasonal basis assembling gifts, packaging and shipping and had earned about \$5200. AR 182.

Plaintiff also testified that she had worked at Weber Haus, an assisted living facility, for one year, bathing and feeding patients. In that job, she had been required to lift 50 pounds or more. AR 183.

When asked to describe the conditions that kept her from working, plaintiff testified that she could not concentrate long enough to complete anything and that she was slow. AR 184. She could handle the work at Figi's each year as a shrink tunnel operator, but she did not think she could do it any longer because of her inability to concentrate. AR 185. She said she had not received any treatment or medication for her condition, id., and had not sought any money from public resources. AR 186.

When the administrative law judge asked plaintiff whether she had asked for help with her mental problems when she was receiving treatment at the Marshfield Clinic for physical problems, plaintiff said that she had been seeing Dr. Field, who had prescribed Citalopram for her anxiety. Id. In answer to another question, she said that she had not asked for any treatment in addition to the medication, and did not know why not. AR 186-87. She did not say that she had been seen by Dr. Waters and had had counseling sessions

with Anthony Louis and Susan Shane.

Plaintiff said that her hands were another reason she could not work, because she was clumsy and tended to drop things, but she was unable to attribute this to any medical condition. AR 187. She said she could not continue in her old job as a potato grader because her boss had said she would not consider hiring plaintiff back, saying that it took plaintiff too long to understand what she was being told to do. AR 187-88.

Under questioning from counsel, plaintiff said that she had seen a Dr. Hurlbut, who had given her tests of her cognitive functioning and talked to her about difficulties she had in employment, such as difficulty following instructions. AR 189. She told the administrative law judge that she needed to be shown how to do things and even then her mind tended to shift. Id. She did not have any trouble with anxiety when she was working as a potato grader because she was working alone. AR 190. She said she could be around a small group of people, and that she never went out with a group of people, id., but sometimes had a small group of people come to her home. AR 191.

Plaintiff described her normal day as getting up and dressed, then feeding her roommate, who required a feeding tube, and taking care of him. She ate breakfast, then gave her husband his pills and got him ready for the day. Id.

Plaintiff said that she had two friends who lived in Stevens Point, whom she saw about once a week. AR 193. She did not think she would be able to go back to work

because of her anxiety and her inability to concentrate, although the medication she had been taking had helped with her anxiety. AR 193-94. In addition, she thought she would be unable to be around people in a workplace setting. AR 194.

2. Testimony of vocational expert

Leslie Goldsmith testified at the hearing as a vocational expert. AR 195. The administrative law judge asked him the following hypothetical: Could a person perform the kind of past work plaintiff had performed if she is limited to lifting or carrying 20 pounds occasionally and 10 pounds frequently; she could stand and walk for six hours, sit six hours and perform only unskilled work with little contact with the public? AR 196. Goldsmith testified that such a person could perform plaintiff's past relevant work of packaging and grading, but not that of a nursing assistant at an assisted living facility, because the assisted living work would require the ability to lift 50 pounds or more. AR 197. If the person were further limited by difficulties withstanding even routine work stress and adapting to change, she would not be able to perform any competitive employment over the long term. AR 197-98. If, however, the person were limited to object-oriented, simple work without public contact, she would be able to perform the past work of packaging and grading, AR 198, as well as other unskilled assembly jobs that are either sedentary or light-duty, and other jobs, such as mail clerk, AR 199, unskilled food assembler and light duty cleaner. AR 200.

Goldsmith said that the jobs of assembly and packaging/inspector were light exertion, semiskilled work, and, according to plaintiff's testimony, would be performed at the unskilled level as well, and the job of packager was listed as medium exertion but could be performed as light exertion, again, according to plaintiff's testimony. Id. He said that plaintiff could perform other jobs, such as assembler, which is unskilled and exists as light exertion and medium exertion; mail clerk, which is light exertion, unskilled; and light duty cleaning, which is unskilled, light exertion. All of these jobs exist in large numbers in Wisconsin, according to the Dictionary of Occupational Titles and the testimony of the vocational expert. AR 199-200.

H. Administrative Law Judge's Decision

In reaching his conclusion that plaintiff was not disabled, the administrative law judge performed the required five-step sequential analysis. 20 C.F.R. § 404.1520. At step one, he found that plaintiff had not engaged in substantial gainful activity since January 1, 2007, the alleged onset date. AR 119. Although she worked after this time, her work activity did not rise to the level of substantial gainful activity. At step two, he found that plaintiff had the severe impairments of depressive disorder (dysthymia), borderline intellectual functioning, anxiety disorder, left shoulder pain, sarcoidosis, asthma, neck pain and back pain.

At step three, the administrative law judge found that plaintiff did not have an impairment or combination of mental impairments that met or equaled a listing in 20 C.F.R. § 404, Subpart P, Appendix I (29 C.F.R. §§ 416.90(d), 416.925 and 416.926). He considered plaintiff's September 2008 report of hand pain, but found that, despite x-rays that showed early osteoarthritic changes and a mild irregularity in her right wrist, the overall evaluation of the x-rays was "unremarkable." AR 120. He found it significant that plaintiff had good range of motion in her fingers and wrist and normal hand grip without sensory deficit; to him, these indicated a "well-maintained ability to perform fine manipulation." *Id.* (citing observations of Dr. Fu at AR 739).

The administrative law judge found that plaintiff's complaints of left shoulder pain were not borne out by clinical observation. To the contrary, the evidence demonstrated good shoulder function: good proximal and distal function of the biceps, intact motor function, intact sensory function and positive deep tendon reflex with rapid alternating hand movements. *Id.* (citing observations of Dr. Keenan at AR 788).

Similarly, the administrative law judge found that plaintiff's complaints of back pain in September 2008 were unsubstantiated by the objective medical evidence. Plaintiff had no observable tenderness in her cervical or thoracic spine areas in April 2009 and she demonstrated normal flexion and full range of motion of the cervical spine. AR 121 (citing observations of Dr. Keenan at AR 787).

Moving to plaintiff's mental impairments, the administrative law judge found that plaintiff's mental impairments did not meet or medically equal the criteria of listings 12.04, 12.05 and 12.06. Plaintiff had only mild restriction in activities of daily living, as shown by her housework, her care of her cats, her father and her husband's nieces, as well as the records of continued work activity after the alleged onset date. Id. (citing David Tetzlaff's function report of plaintiff at AR 502-10). He concluded that plaintiff had no difficulties in social functioning. AR 122. Although she testified that she had social anxiety, did not like to be around people and avoided social activity, the record evidence was to the contrary. Plaintiff went to church, spent time with others, went to the Neighborhood Table weekly for meals, played games, shopped and barhopped. Id. (citing plaintiff's July 24, 2007 function report, AR 453-60; plaintiff's Aug. 15, 2008 function report at AR 440; Munro's function report of plaintiff at AR 436; and Tetzlaff's function report of plaintiff at AR 502-10).

Looking at Listing 12.05, mental retardation, the administrative law judge found that plaintiff did not meet the requirements for disability under this listing. She was not dependent upon others for her personal needs (§ A); she did not have a valid verbal, performance or full scale IQ of 59 (§ B); and she did not have a valid verbal, performance or full scale IQ of 60 through 70 together with a physical or other mental impairment imposing an additional and significant work-related limitation of functioning (§ C). Finally, she did not have a valid verbal, performance or full scale IQ of 60 through 70 resulting in

(1) marked restriction of activities of daily life; (2) marked difficulties in maintaining social functioning; (3) marked difficulties in maintaining concentration, persistence or pace; or (4) repeated episodes of decompensation, each of extended duration. (¶ D).

At the fourth step, the administrative law judge found that plaintiff had the residual functional capacity to perform light work with the following functional limitations: lifting or carrying 20 pounds occasionally, 10 pounds frequently, sitting six hours in an eight-hour day and standing or walking six hours in an eight-hour day, with no other physical limitations. AR 123. Mentally, plaintiff was limited to simple work with no public contact, working in a small group with no group interaction on object-oriented work and training by demonstration. Id.

In making these findings, the administrative law judge said that he had considered all the symptoms plaintiff reported and the extent to which those symptoms could reasonably be accepted as consistent with the objective medical evidence and other evidence, in accordance with the requirements of 20 C.F.R. 404.1529 and 416.929 and SSRs 96-4p and 96-7p. He followed a two-step process, first determining whether plaintiff had an underlying medically determinable physical or mental impairment and then evaluating the intensity, persistence and limiting effects of plaintiff's symptoms to determine the extent to which they limited the plaintiff's functioning.

In making this determination, the administrative law judge found plaintiff "less than

credible.” AR 124. Her activities of daily living were inconsistent with her claimed inability to work. She testified that she could not concentrate, that her hands were slow and that she dropped things, but she was able to prepare meals, clean, do laundry, perform household repairs, garden, mow the lawn, wash dishes, care for her father, her then-fiancé and his nieces and her pets. In addition, the medical record revealed inconsistent reporting by plaintiff. She denied all use of alcohol to her medical providers, but her friend reported that she barhopped most Saturday nights. Id. (citing Tetzlaff function report at AR 506). She testified that she could not work because of concentration problems, but at other times she denied any problems with concentration. Id. (citing Waters report at AR 808). She told a counselor that she wanted to leave a job; the next month she said she had been terminated for her refusal to work excessive hours. AR 124-25 (citing Lewis reports at AR 623, 707).

The administrative law judge found that the objective evidence in the record did not support functional incapacity “consistent with a finding of disability.” AR 125. He noted the lack of evidence to support plaintiff’s complaints of her inability to hold on to things and her back and shoulder pain and that the subjects of many of her complaints were well controlled or improving. He explained that he was giving great weight to the opinions of the agency examiners concerning plaintiff’s physical limitations and noted that none of the treating physicians had reached any different conclusions. AR 127.

Plaintiff’s behavioral health notes repeated that plaintiff was “doing fairly well,”

suggesting that her alleged mental impairments were not severe. Id. Again, he said he was putting great weight on the opinions of the agency’s medical examiners, who had provided extensive explanations for their assessments of plaintiff, but that he had included additional mental impairment based on plaintiff’s hearing testimony and Dr. Hurlbut’s evaluation. Id. He did not incorporate all of Dr. Hurlbut’s opinion to the extent it was based on plaintiff’s “unreliable subjective reports.” Id.

The administrative law judge found that evidence in the record cast doubt on plaintiff’s credibility and “whether her application is based on genuine functional impairment as a result of disability.” AR 125. He noted that her treatment notes in 2007 reported that plaintiff was filing for disability because she had lost her job and in 2008, she was complaining of the distance she had to travel to work and her fiancé’s eagerness for her to file for disability. Id.(citing Lewis reports at AR 622, 707).

Finally, the administrative law judge found plaintiff’s credibility undermined by her doctors’ observations that they too questioned her credibility. AR 126. For example, one social worker noted consistently that plaintiff was “questionable,” or “inconsistent” or “presents as ‘less than credible,’” id. (citing Lewis reports at AR 622, 707), and Dr. Waltonen noted that plaintiff “had difficulty providing a consistent history.” Id. (citing Waltonen report at 687).

The administrative law judge explained why he had made his determination of

plaintiff's residual functional capacity, noting that the residual functional capacity assessment accounted for certain limitations, such as plaintiff's claimed inability to work for only a few hours before her mind began to wander or to work in large groups, even though these allegations were unsupported by objective medical evidence and were contrary to plaintiff's reports to her doctors and counselors. Id. He rejected plaintiff's complaints of eye problems and pain related to rheumatoid arthritis and fibromyalgia because the record did not contain any evidence to support a finding that these conditions were medically determinable. AR 127. He rejected Dr. Hurlbut's opinion to the extent that it was based on plaintiff's report of physical impairments for which she has no medical diagnoses despite testing and examination for the impairments.

At step five, the administrative law judge found that plaintiff was capable of performing her past relevant work as an assembler and packager, which did not require her to perform work-related activities precluded by her residual functional capacity. AR 128. He explained that he based this finding in part on the testimony of Leslie Goldsmith, the vocational expert, who had testified at plaintiff's hearing.

OPINION

A. Standard of Review

The standard by which a federal court reviews a final decision by the commissioner

is well settled: the commissioner's findings of fact are "conclusive" so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). The decision cannot stand if it lacks evidentiary support or "is so poorly articulated as to prevent meaningful review." Steele v. Barnhart, 290 F.3d 936, 940 (7th Cir. 2002). When the administrative law judge denies benefits, he must build a logical and accurate bridge from the evidence to his conclusion. Zurawski v. Halter, 245 F.3d 881, 887 (7th Cir. 2001).

B. Plaintiff's Disagreement with the Administrative Law Judge's Decision

Plaintiff objects to the administrative law judge's determination in four respects: his rejection of Dr. Hurlbut's findings, although Hurlbut was an examining source; his failure to properly evaluate plaintiff's diminished work pace; his failure to consider the state agency's residual functional capacity determination regarding plaintiff's left shoulder; and his failure to properly assess plaintiff's borderline intellectual function.

1. Rejection of Dr. Hurlbut's mental evaluation of plaintiff

Plaintiff says that the administrative law judge failed to give sufficient weight to the opinion of Dr. Hurlbut, who was a consultative examiner. She objects in particular to the

administrative law judge's refusal to accept the report in full and contends that he gave unsupported reasons for his rejection of the findings. She thinks that he should have accepted all of Hurlbut's report because Hurlbut was a consultative medical source whose opinion outweighs that of agency doctors. Neither argument is persuasive.

At the outset, it is worth noting that the administrative law judge did not reject the entire report. He explained in detail which portions he rejected and gave good grounds for the rejections. He refused to accept Hurlbut's medical diagnosis that plaintiff had a global assessment of functioning (GAF) of 50, both because the assessment was not consistent with the objective medical evidence and because of agency policy that a GAF score does not have a direct correlation to the severity requirements for making mental impairment assessments. AR 127. It was legitimate for the administrative law judge to make both determinations. As he pointed out, Dr. Hurlbut had accepted as true plaintiff's reports of her physical and mental condition, without knowing that some of the impairments she listed had never been confirmed by any medical testing or examination.

Although plaintiff says that the administrative law judge did not explain why plaintiff's reports were inconsistent with the objective medical evidence, she is wrong. The administrative law judge said that Hurlbut's report included plaintiff's reports of fibromyalgia, chronic fatigue syndrome and eye problems, none of which had ever been found by medical professionals upon examination, and it did not take into account the

number of instances in which plaintiff's report of her mental state was positive and upbeat and far from the GAF score that Hurlbut assessed. AR 126 (noting that in June 2008 and December 2008, plaintiff denied having any significant problems with concentration, energy or anxiety). Finally, despite the problems that the administrative law judge identified in Hurlbut's report, he incorporated the majority of the limitations identified by Hurlbut into his own residual functional capacity assessment.

As for plaintiff's belief that the administrative law judge gave more weight to agency sources than he did to Hurlbut, who had actually examined plaintiff, she overlooks the fact that Dr. Waltonen also examined plaintiff and concluded that her mental impairments did not rule out all work activity. The administrative law judge explained that he gave weight to the opinion of the agency medical consultants because of the extensive rationale they provided in support of their mental capacity assessments, but that he included additional mental impairments that he derived from plaintiff's hearing testimony and Hurlbut's report.

2. Failure to properly evaluate plaintiff's diminished concentration, persistence and work pace

Plaintiff argues that the administrative law judge did not properly evaluate the concentration, persistence and pace factors, failed to incorporate corresponding limitations in his questions to the vocational expert and did not articulate a basis for leaving them out.

She says that it was “misleading” for the administrative law judge to find that Dr. Waltonen’s opinion was generally consistent with the functional assessment because he did not incorporate all of the limitations identified by Waltonen into the hypothetical question he posed to the vocational expert, such as plaintiff’s struggle with auditory based stimulation and the extent to which her learning disability interfered with her past job performance.

Defendant points out that plaintiff did not raise these concentration, persistence and pace factors as concerns when she testified at her hearing and that the record does not support a finding that plaintiff experienced these problems on an ongoing basis. As the administrative law judge pointed out, when plaintiff saw her treating psychiatrist, Dr. Waters, on December 10, 2008, she denied having any problems with concentration, energy level or anxiety and when Waltonen undertook his evaluation of her, he found no signs of distractibility.

It was not an error for the administrative law judge to omit these limitations from his hypothetical question. He gave persuasive reasons for doing so.

3. Failure to consider state agency’s residual functional capacity determination with respect to plaintiff’s left shoulder

Although the administrative law judge identified plaintiff’s left shoulder pain as a severe impairment, he noted that the objective medical findings showed that she did not

have a rotator cuff tear and that she answered “no” to most of the questions asked her about the pain. She never mentioned shoulder pain at the hearing and the record does not support her claim that this alleged shoulder pain would prevent her from working at a job that required reaching in all directions.

4. Failure to properly assess plaintiff’s borderline intellectual functioning

Plaintiff argues that the administrative law judge did not consider whether her IQ scores might have qualified for a mental listing under 12.05, but this argument is unconvincing. The administrative law judge considered the criteria in 12.05 before concluding that plaintiff did not meet them. Plaintiff argues that two district court cases require additional consideration, but neither case is like hers. In Moore v. Astrue, 2008 WL 740358 (S.D. Ind. Mar. 14, 2008), the plaintiff had a valid full scale IQ of 69, which, unlike plaintiff’s scores, clearly fell within the listing. In Thomas v. Astrue, 2011 WL 5052049 (N.D. Ill. Oct. 19, 2011), the court reversed the commissioner’s decision because the administrative law judge had not noted plaintiff’s lowest score of 70 and had analyzed Listing 12.05(C) in only a conclusory fashion. In this case, the administrative law judge took all of plaintiff’s IQ scores into consideration and explained fully why he was not persuaded that they equaled Listing 12.05(C).

In summary, I conclude that the administrative law judge gave full consideration to

plaintiff's symptoms and the reports of her treating physician and that he had good reasons for concluding that plaintiff did not have physical restrictions that would prevent her from performing light, unskilled work of the type identified by the vocational expert. The conclusion is supported by substantial evidence.

ORDER

IT IS ORDERED that plaintiff Linda Passineau's motion for summary judgment is DENIED and the decision of defendant Michael J. Astrue, Commissioner of Social Security, denying plaintiff's application for disability insurance benefits is AFFIRMED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 27th day of August, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge